

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 2:19-cr-20271

HONORABLE STEPHEN J. MURPHY, III

v.

D-1 ERIC JOHNSON and
D-2 EVANN ROBINSON ,

Defendants.

**ORDER DENYING
DEFENDANT JOHNSON'S
MOTION TO SUPPRESS INSTAGRAM
EVIDENCE [33], MOTION TO SUPPRESS
FRUITS OF THE SEARCH OF DEFENDANT'S HOME
[32], AND DEFENDANT ROBINSON'S CONCURRENCE
IN THE MOTION TO SUPPRESS INSTAGRAM EVIDENCE [40]**

On May 1, 2019, a grand jury indicted Defendant Eric Johnson ("Johnson"). ECF 8 and charged him with possession of a firearm in furtherance of a drug trafficking crime, possession with intent to deliver a controlled substance, and felon in possession of a firearm. *Id* at PgID 1. On June 19, 2019, the grand jury indicted Defendant Evann Robinson ("Robinson") on one count of felon in possession of a firearm. ECF 18, PgID 116. On July 8, 2019, Johnson filed two motions: a motion to suppress Instagram evidence, ECF 33, and a motion to suppress the fruits of the search of Johnson's home, ECF 32.¹ The Government responded on July 29, 2019,

¹ On July 13, 2019, Defendant Evann Robinson concurred in Johnson's motion to suppress Instagram evidence. ECF 40. Robinson and Johnson's motions will be denied for the same reason.

ECF 54, 56, and Johnson replied on August 23, 2019, ECF 65, 66. The Court reviewed the briefs and finds that a hearing is unnecessary. *See* E.D. Mich LR 7.1(f). For the reasons below, the Court will deny Defendants' motions.

BACKGROUND

At some point during the Government's investigation into Defendants, Bureau of Alcohol, Tobacco, and Firearms ("ATF") agents viewed the Instagram account "gettin_my_groove," an account that both Johnson and the Government agree belongs to Robinson. ECF 33, PgID 221; ECF 54, PgID 306. And the agents' inspection of the "getting_my_groove" account led them to investigate an account titled "narcata_boutdollaz." ECF 32-2, PgID 192.

The search warrant affidavit laid out many facts underlying the Government's investigation and recited that ATF agents initially reviewed Robinson's Instagram account—"gettin_my_groove"—when they saw a video of Johnson at a "target" location"² (hereinafter "Johnson's apartment"). ECF 32-2, PgID 190–92. The "getting_my_groove" account also "tagged" the "narcata_boutdollaz" account in an Instagram "story"—posted on April 9, 2019, at 1:00 a.m.—that both showed Johnson and contained a verbal exchange between Robinson and Johnson. *Id.* at 191–92. Based on the "story", agents suspected Johnson was the owner of the "narcata_boutdollaz" account. *Id.* at 192. The warrant affidavit states that the video showed "a small wooden table, with suspected narcotics packaging material" in the living room of Johnson's apartment. *Id.* at 191.

² The location was later identified as Johnson's apartment.

On April 9, 2019, again at approximately 1:00 a.m., Robinson posted a video of himself smoking what the Government identified as suspected marijuana on the "getting_my_groove" Instagram account. *Id.* at 193. A few hours later, Robinson posted a video depicting a view from what appeared to be Johnson's apartment window. *Id.* at 194. Robinson also posted a video where officers observed a jar containing suspected marijuana, credit cards, U.S. Currency, and a Taurus firearm. *Id.* at 194.

On April 8, 2019, Robinson posted a video of Johnson getting a haircut in his apartment. *Id.* at 195. The agents determined that the layout of the apartment and its contents were consistent with the photographs they had seen of Johnson's apartment. *Id.* at 196. On March 15, 2019, Robinson posted a photograph of what again appeared to be a view from Johnson's apartment window. *Id.* In August of 2017, Johnson posted a video on his Instagram account that showed an identical view out a window. *Id.* at 196–97.

Agents then surveilled Johnson's apartment on two different days, and, on both days, they observed a gray Dodge Charger, registered to Johnson, in the parking lot of the building. *Id.* at 198. The agents located a door to Johnson's apartment and determined that the view from it would be consistent with the views depicted in Johnson's and Robinson's Instagram photographs and videos. *Id.* Finally, the agents checked computer databases and found that Johnson had a utility listing at the target location. *Id.* Based on the foregoing information, Magistrate Judge David R. Grand issued a search warrant for Johnson's apartment on April 11, 2019. *Id.* at 186.

LEGAL STANDARD

The Fourth Amendment protects "[t]he rights of the people to be secure . . . against unreasonable searches and seizures[.]" U.S. Const. amend. IV. To secure the right, the Amendment provides that "no Warrants shall issue, but upon probable cause[.]" *Id.* "Probable cause exists when there is a fair probability, given the totality of the circumstances, that contraband or evidence of a crime will be found in a particular place." *United States v. Davidson*, 936 F.2d 856, 859 (6th Cir. 1991) (quotations omitted). To establish probable cause, a warrant must be "supported by Oath or affirmation." U.S. Const. amend. IV. And a search warrant affidavit "must contain adequate supporting facts about the underlying circumstances to show that probable cause exists." *United States v. Weaver*, 99 F.3d 1372, 1377 (6th Cir. 1996).

When issuing a search warrant, the "magistrate is simply to make a practical, common-sense decision" given the totality of the facts. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). When reviewing a search warrant, courts must give "great deference" to the magistrate's determination while ensuring that the magistrate "had a substantial basis for concluding that probable cause existed." *Id.* at 236, 238–39. A magistrate's probable cause determination "should be reversed only if arbitrarily made." *United States v. Jackson*, 470 F.3d 299, 306 (6th Cir. 2006).

"In order to challenge a search or seizure as a violation of the Fourth Amendment, a person must have had a subjective expectation of privacy in the place or property to be searched which was objectively reasonable." *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001). "What a person knowingly exposes to the public, even in his

own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967).

DISCUSSION

I. The Instagram Search

Instagram users may opt to maintain their accounts as "public" or "private." Only "followers" approved by the account holder may see what a private account holder shares. But anyone can see, "like," or comment on a public account's photographs or videos. *Privacy Settings & Information*, INSTAGRAM, <https://help.instagram.com/196883487377501> (last visited Aug. 26, 2019).

Johnson alleges that the Government used an undercover Instagram account to interact with his private account. ECF 33, PgID 220. Johnson does not argue that the Government somehow invaded his Instagram account in a surreptitious or extra-legal manner. So, Johnson must have authorized the undercover agents' access to his account. And Johnson knew or should have known that every post he shared on social media would have been visible to those he made his "friends."

"What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area." *Hoffa v. United States*, 385 U.S. 293, 301 (1966). It does not protect an individual's "misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Id.* at 302. Here, Johnson voluntarily provided the images and videos on his Instagram page to all of his followers and thereby permitted those followers—including the undercover account here—to access them without violating the Fourth Amendment. *See United States v. Meregildo*, 883 F. Supp. 2d 523, 526 (S.D.N.Y. 2012)

(holding that the Government can view a suspect's "Facebook profile through the Facebook account of one of [the suspect's] 'friends' who was a cooperating witness").

The United States District Court for the District of New Jersey analyzed a similar issue and came to the same conclusion. In *United States v. Gaston*, "law enforcement officers used an undercover account to become Instagram 'friends' with Gaston." No. 13-705, 2014 WL 7182275 at *22 (D. N.J. Dec 16, 2014). "Gaston accepted the request to become friends. As a result, law enforcement officers were able to view photographs and other information Gaston posted to his Instagram account. No search warrant is required for the consensual sharing of this type of information." *Id.* Johnson's Fourth Amendment rights were not violated when the Government used an undercover Instagram profile to access Johnson's Instagram account. The Court will therefore deny his motion to suppress.

There is no Fourth Amendment protection when one voluntarily shares information. *See e.g., Hoffa*, 385 U.S. at 301–02. Johnson voluntarily shared access to his Instagram account with his friends, and just as in *Gaston*, one of his friends was an undercover Government agent. There was no Fourth Amendment violation, and Johnson's motion to suppress Instagram evidence must be denied.

II. Motion to Suppress the Fruits of the Search of Johnson's Home

In a separate motion to suppress, Johnson argues that the search warrant affidavits failed to establish probable cause that his apartment would contain evidence of a crime. ECF 32, PgID 165.

The 15-page search warrant affidavit laid out—in considerable detail—a chronology of supporting facts regarding the Government's investigation. The affidavit specifically stated that the investigation started when an agent reviewed Robinson's Instagram posts. ECF 32-2, PgID 190. The affidavit stated that Johnson had previously been convicted of felony firearm and felony home invasion in the second degree offenses. *Id.* at 190. The affidavit also stated that while the affiant was reviewing Robinson's Instagram, she "observed several videos taken from inside the target location." *Id.* at 191. According to the affidavit, on April 9, 2019, at 1:00 a.m., Robinson posted a video of Johnson standing in the target location—his apartment. That video showed a small wooden table that had suspected narcotics packaging material on it. *Id.* Moreover, Robinson's Instagram tagged the account "narcata_boutdollaz," which was Johnson's suspected account. *Id.* at 192.

Around the same time on April 9, 2019, Robinson posted a second video of himself smoking what agents believed to be marijuana inside of what appeared to be Johnson's apartment. *Id.* at 193. Then, at around 8:00 a.m. the same day, Robinson posted a video looking out Johnson's apartment window. *Id.* at 194. Around the same time, Robinson posted a video depicting a pistol, a large amount of U.S. currency, a jar containing what agents believed was marijuana, credit cards, and narcotics packaging material on a table. *Id.*

The affidavit further stated that on April 8, 2019, Robinson posted a video of Johnson getting a haircut in his apartment. *Id.* at 195–96. The video showed a kitchen and a living room table that matched other videos and photographs of the apartment.

Id. at 195–96. Additionally, pursuant to the affidavit, "[o]n March 15, 2019, Robinson posted a video of the view from the [t]arget [l]ocation" showing the view out the window. *Id.* at 196. And Johnson's Instagram account had previously posted a video titled "walk thru" that showed the same view. *Id.* at 197.

Finally, on April 9, 2019, after viewing Robinson's Instagram posts from that same morning, agents surveiled Johnson's apartment and located a vehicle registered to Johnson. *Id.* at 197–98. On April 10, 2019, agents again surveilled the apartment, and again found the same vehicle registered to Johnson. *Id.* at 197–98. Additional surveillance of the apartment revealed that the view from Johnson's apartment would be consistent with the view in the photographs that the affidavit had previously addressed. *Id.* at 198. Finally, open source computer database checks revealed a utility listing registered to Johnson at the apartment. *Id.*

The above facts in the affidavit raised at least a fair probability that agents would discover evidence of criminal activity at Johnson's apartment. The affidavit established that there were narcotics, firearms, and large amounts of U.S. currency at the location where Robinson was taking videos, that the view from the location was the same as the view Johnson posted during his "walk thru" tour of his apartment, that Johnson's vehicle was in the parking lot of the target location, and finally that Johnson had a utility account for the location as of December 2018.

Based on the "totality of the circumstances," the search warrant affidavits provided "reasonable grounds for belief" that police would find evidence of stolen firearms, individuals possessing drugs with the intent to deliver the same, and felons

in the possession of firearms. *United States v. Ferguson*, 8 F.3d 385, 392 (6th Cir. 1993). The affidavit for the target location met all applicable standards set forth in *Illinois v. Gates*, 462 U.S. 213, 238, 244 n.13 (1983). There was probable cause that agents would find evidence of a crime at the target location, and the magistrate committed no error in issuing the warrant.

Johnson makes passing reference to the nexus requirement: that the Fourth Amendment requires a search warrant affidavit "demonstrate a nexus between the evidence sought and the place to be searched." ECF 32, PgID 172 (citing *United States v. Brown*, 828 F.3d 375, 382 (6th Cir. 2016)). The nexus "between the residence and the evidence of criminal must be specific and concrete" and the analysis to determine whether there is "a proper nexus is a fact-intensive question resolved by examining the totality of circumstances presented." *Brown*, 828 F.3d at 382 (internal citations omitted). Here, Robinson simultaneously posted photographs from Johnson's apartment and photographs of narcotics, firearms, and currency. The Government tied Johnson to the target location through his appearance in some of Robinson's videos, Johnson's own videos showing a similar view, the presence of a car registered to Johnson at the apartment complex on two separate days, and the utility listings for the location that was registered to Johnson. Agents presented photographs from the location as well as photographs that showed narcotics, currency, and a firearm taken approximately the same time. The nexus requirement was satisfied, and the Court will therefore deny the motion.

ORDER

WHEREFORE, it is hereby **ORDERED** that Defendant Johnson's motion to suppress the fruits of the search of his home [32] is **DENIED**.

IT IS FURTHER ORDERED that Johnson's motion to suppress Instagram evidence [33] is **DENIED**.

IT IS FURTHER ORDERED that Robinson's concurrence in Johnson's motion to suppress Instagram evidence [40] is **DENIED**.

SO ORDERED.

s/ Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: September 5, 2019

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on September 5, 2019, by electronic and/or ordinary mail.

s/ David P. Parker
Case Manager